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87-282

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

SOUTH BEND COMMUNITY SCHOOL CORPORATION,
Petitioner,

v.

ELMER BRITTON, et al.,
Respondents.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,
Petitioners,

v.

JULIE ANDREWS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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August 14, 1987

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QUESTIONS PRESENTED

1. Whether (1) a public school district has a compelling or important interest in enhancing the quality of education for all its students by providing a racially diverse faculty and, if so, whether (2) a temporary no-minority layoff provision in the school district's collective bargaining agreement is a *per se* violation of the fourteenth amendment or Title VII simply because it was adopted to preserve the gains made pursuant to an affirmative action plan having an unrealized goal of raising the percentage of black teachers to approximate the percentage of black students?

2. Whether an affirmative action provision in a collective bargaining agreement of a public school district is unconstitutional *per se* or violates Title VII solely because it provides that no minority will be laid off, notwithstanding:

(a) The extent of past employment and other racial discrimination by the employer;

(b) Delay in remedying such discrimination;

(c) The limited term of the agreement;

(d) Protections afforded to laid-off nonminority teachers, such as permanent substitute positions and preferential recall and substitution rights;

(e) Approval of the collective bargaining agreement by the teachers' union, a majority of whom are white;

(f) The effect of the provision was merely to raise the percentage of black teachers in the school district from 13.0% to 13.8% when the percentage of black students was 25%; and

(g) The effect of the provision was that, out of over 1,200 white teachers, only 13 to 16 were laid off who would not have been laid off on the basis of strict seniority?

3. Where this Court rendered its opinion in *Wygant v. Jackson Board of Education* between the date of the district court's decision and the decision of the Court of Appeals *en banc*, whether the district court as the trier of fact should determine in the first instance whether the affirmative action layoff provision at issue serves a compelling or important purpose and is narrowly tailored or substantially related to achieving that purpose within the meaning of *Wygant*?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to Cause No. S82-283 in the district court were the petitioner, South Bend Community School Corporation, and the respondents, Elmer Britton and Janet Kochanowski, individually and on behalf of all other similarly situated permanent public school teachers employed by the petitioner.

The parties to Cause No. S82-485 in the district court were the petitioners, South Bend Community School Corporation, Rev. C. Marcus Engdahl, Charles F. Lennon, Jr., Trudy McManama, Bruce A. McMillen, Richard Kapiszka, and Carol B. Loeffler,* acting in their official capacity as members of the Board of Trustees of the South Bend Community School Corporation, and the following respondents:

Julie Andrews
Rosemarie Bradford
Barbara Gottlick
Cleora Kelsch
Janet L. Kochanowski
Margaret McAllister
Mary Pajakowski
Sue Paulin
Kathleen Renz
Perry B. Scott
Dale L. Strombeck
Joan Tetzlaff
John P. Wibbens
Wallace Boocher
Larry L. Edler
Sue Hill
John W. Berta
Anita Golba
Helen Keller
Sandra J. Koch Bolka
Kenneth Marosz
Linda Newcomer
John Panos
Gordon Polsgrove
Dora L. Riddle
Lynn D. Sill
Judith E. Taelman
Kathy Troester
Alan S. Bell
Kathryn A. Britton
J. A. Garretsom
Bonita Hoover

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*The individuals named in the text were automatically substituted under Fed. R. Civ. P. 25(d)(1) and Supreme Court Rule 40.3 for the following named defendants: Hollis E. Hughes, Jr., William L. Wilson, Loretta Jacobson, Oscar T. Brookins, Anthony V. Luber, Eileen T. Bender, and Donald W. Yates.

Edward J. Linetty	Jean Meiss
Richard B. Rajter	Richard Tomaszewski
Patricia A. Toth	Terry Tulchinsky
Bonita Ujdak	Elmer Britton

South Bend Community School Corporation has no parent companies, subsidiaries, or affiliates.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 28.1 LIST	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	10
I. Summary Of Reasons	10
II. The Decision Below Holding The School Corporation's Affirmative Action Layoff Provision Unconstitutional *Per Se* Raises Important And Unresolved Issues	11
III. The Decision Below Conflicts With Decisions Of This Court And Of Other Circuits	18
A. The Decision Below Conflicts In Principle With *Bakke* and *Wygant*	18
B. The *Per Se* Analysis Developed By The Concurring Opinion Below Conflicts In Principle With Several Affirmative Action Decisions Of This Court	20
C. The Court of Appeals' Failure to Remand Is Inconsistent With Decisions Of This Court And At Least Two Courts of Appeals	25
CONCLUSION	29

Page

APPENDIX (Separately Bound)

1. Constitutional and Statutory Provisions Involved 1a
2. Judgment of Seventh Circuit Court of Appeals *En Banc*. 2a
3. Opinion of Seventh Circuit Court of Appeals *En Banc* 4a
4. Order Granting Rehearing *En Banc* and Vacating Panel Opinion. 43a
5. Judgment of Panel of Seventh Circuit Court of Appeals 45a
6. Opinion of Panel of Seventh Circuit Court of Appeals 46a
7. Judgment of District Court 98a
8. Opinion of District Court 99a
9. Resolution 1020 . . . . . 118a
10. Consent Decree in *United States v. South Bend Community School Corporation* 121a
11. Article XXIII of 1980-1983 Collective Bargaining Agreement 126a

TABLE OF AUTHORITIES

Cases: *Page*

Brown v. Weinberger, 417 F. Supp. 1215 (D.D.C. 1976) 5

Green v. County School Board, 391 U.S. 430 (1968) 20

Johnson v. Transportation Agency, Santa Clara, California, ___ U.S. ___, 107 S. Ct. 1442 (1987) 16, 21, 25, 27

Lehman v. Trout, 465 U.S. 1056 (1984) (mem.) 18, 25

Liao v. Dean, 658 F. Supp. 1554 (N.D. Ala. 1987) . . 16-17

LeDoux v. District of Columbia, 820 F.2d 1293 (D.C. Cir. 1987) 26

Long v. City of Saginaw, No. 85-1352, slip op. (6th Cir. Oct. 20, 1986) 26-27

Miree v. DeKalb County, 443 U.S. 25 (1977) 17

NAACP v. Detroit Police Officers Ass'n, 125 L.R.R.M. (BNA) 2784 (6th Cir. 1987) 14, 17

Oil Workers' Union v. Mobil Oil Corp., 426 U.S. 407 (1976) 17-18

Pullman-Standard v. Swint, 456 U.S. 263 (1982) . . . 18, 25

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 18-19

Rinaldi v. United States, 434 U.S. 22 (1977) 17

Smith v. Harvey, No. 84-212-Civ-T-13, slip op. (M.D. Fla. Oct. 3, 1986) 24

United States v. Paradise, 480 U.S. ___, 107 S. Ct. 1053 (1987) 21-24

Page

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 16, 21

Wygant v. Jackson Board of Education, 476 U.S. ___, 106 S. Ct. 1842 (1986) . . . . . *passim*

Constitutional and Statutory Provisions:

U.S. Const. amend. XIV, § 1 3

42 U.S.C. § 2000e *et seq.* 2, 3

42 U.S.C. §§ 1981, 1982, 1983, and 2000e *et seq.* 2, 3

28 U.S.C. §§ 1331 and 1343(a)(3) and (4) 2, 3

Miscellaneous:

34 C.F.R. Part 100, App. B. at 337 (1986) 14

Stewart, *Affirmative Action Barely Upheld*, 72 A.B.A. J. 44 (Dec. 1, 1986) 22

Choper, *Continued Uncertainty As To The Constitutionality Of Remedial Racial Classifications: Identifying The Pieces Of The Puzzle*, 72 Iowa L. Rev. 255 (1987) 12, 22

Kandel, *The Limits of* Wygant v. Jackson Board of Education, 12 Empl. Rel. L.J. 289 (1986) 12

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OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Seventh Circuit is reported at 819 F.2d 766 and is reprinted in the accompanying Appendix to Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit at pp. 4a-42a (hereinafter "App.").

The panel opinion of the Court of Appeals for the Sev-

enth Circuit is reported at 775 F.2d 794 and is reprinted in the Appendix at pp. 46a-97a.

The opinion of the United States District Court for the Northern District of Indiana is reported at 593 F. Supp. 1223 and is reprinted in the Appendix at pp. 99a-117a.

JURISDICTION

In Cause No. S82-283, the plaintiffs filed a complaint in the United States District Court for the Northern District of Indiana alleging that the South Bend Community School Corporation had laid them off on the basis of their race in violation of 42 U.S.C. § § 1981, 1982 1983, and 2000e *et seq.* The plaintiffs in that case invoked jurisdiction under 28 U.S.C. § § 1331 and 1343(a)(4). In Cause No. S82-485, the plaintiffs, relying upon the same federal constitutional and statutory provisions as well as the Indiana Constitution and Teacher Tenure Act, filed a complaint in the Circuit Court of St. Joseph County, Indiana, against the School Corporation and certain members of its Board of Trustees in their official capacity (sometimes referred to collectively as the "School Corporation"). Invoking jurisdiction under 28 U.S.C. § § 1331 and 1343(a)(3), the School Corporation removed the state court complaint to the district court. On November 2, 1982, the district court consolidated the cases for all purposes. After a bench trial, the district court entered judgment in favor of the School Corporation on the plaintiffs' federal law claims and dismissed the plaintiffs' state law claims without prejudice. App. at p. 98a.

On October 21, 1985, the Court of Appeals for the Seventh Circuit affirmed the judgment of the district court. App. at p. 46a. The plaintiffs sought rehearing *en banc*, which was granted on February 12, 1986. App. at p. 43a. On May 18, 1987, the Seventh Circuit *en banc* reversed the judgment of the district court and remanded the case to the district court for a determination of the damages or other relief to which the plaintiffs may be entitled. App. at 2a,

4a-42a. The last day for filing this petition was August 17, 1987.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented in this case involve section one of the fourteenth amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Those provisions are reprinted in the Appendix at p. 1a.

STATEMENT OF THE CASE

The complaints in Cause Nos. S82-283 and S82-485 alleged that the plaintiffs had been laid off because of their race in violation of the fourteenth amendment and 42 U.S.C. § § 1981, 1982, 1983, and 2000e. The complaint filed in S82-283, and a petition for removal of the state court complaint in S82-485, invoked jurisdiction under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*, 28 U.S.C. § 1331 (general federal question jurisdiction), and 28 U.S.C. § 1343(a)(3) and (4) (denial of civil rights).

Confronted with budgetary constraints and declining pupil enrollment, on June 17, 1982, the School Corporation laid off 188 teachers, including the 41 plaintiffs. The School Corporation conducted the layoffs pursuant to the 1980-83 collective bargaining agreement (the "CBA") between itself and the teachers' union, the NEA-South Bend. Article XXIII, § 9 of the CBA stated that "in the event of a reduction in force, no minority bargaining unit employee shall be laid off." App. at 127a. This provision had been inserted into the CBA to prevent an anticipated reduction in force from decimating the gains the School Corporation had achieved in increasing minority representation on its faculty pursuant to an affirmative

action program adopted in response to judicial, administrative, and community attacks on its hiring practices. The plaintiffs allege that they have more seniority than minority teachers whom the School Corporation did not layoff and that, as a result, their layoff violated the fourteenth amendment and certain federal civil rights statutes.

I. Factual Basis For The School Corporation's Affirmative Action Plan.

Indiana law officially prescribed segregated schools until 1949. For the 1963-64 school year, the minority teaching staff in the School Corporation was only 3.5 percent of the total teaching staff (Def. Ex. H).

A. Administrative and Judicial Findings of Past Discrimination.

Findings of past discrimination by the School Corporation in the recruitment, hiring, and promotion of minority teachers in the record of this case date back to the late 1960's. A letter from Kenneth Mines, Director for Region V of the Office for Civil Rights ("OCR") of the United States Department of Health, Education and Welfare ("HEW"), to the Superintendent of the School Corporation reviewed an OCR inspection of the School Corporation's compliance with Title VI conducted in October, 1969. The letter lists five areas, including the recruitment of minority teachers, where the OCR found evidence of discrimination on the part of the School Corporation (Def. Ex. M-6).

In April, 1975, the Superintendent responded to Mr. Mines' concerns in an 18-page letter. After the OCR conducted a second on-site review in 1975 and the parties exchanged additional correspondence, the OCR remained unsatisfied. Accordingly, by letter dated October 6, 1975, the OCR informed the School Corporation that it had determined the School Corporation was not complying with Title VI. The OCR directed the School Corporation to submit a plan within 45 days designed to eliminate any vestiges of past discrimination (Def. Ex. M-3).

After additional negotiations, in March, 1976, the OCR again rejected the School Corporation's justification for delay in achieving voluntary compliance. The OCR specifically directed the School Corporation to submit a plan which included an assurance that it would maintain non-discriminatory recruitment, hiring, and assignment policies with regard to teachers (Def. Ex. M-2).

On July 20, 1976, Judge Sirica of the United States District Court for the District of Columbia granted summary judgment in favor of certain plaintiffs seeking an injunction directing the HEW to commence enforcement proceedings against several school districts which the HEW had found were not in compliance with Title VI. *Brown v. Weinberger*, 417 F. Supp. 1215, 1223 (D.D.C. 1976). The School Corporation was among these districts. *Id.* at 1224.

B. The Adoption of Resolution 1020, The School Corporation's Affirmative Action Plan.

On December 18, 1978, the Board of Trustees adopted Resolution 1020, an affirmative action plan. App. at p. 118a-120a. The opening section of Resolution 1020 states its purpose in the following terms:

> The Board of School Trustees of the South Bend Community School Corporation are committed to quality education for all its students. We believe that equal employment and equal promotional opportunities for all of its employees will enhance that commitment. Public schools reflect a cross section of society from all ethnic, socio-economic and other phases of the community. To provide in-depth education, the schools need to provide in the learning environment an opportunity for children to experience highly qualified representatives of all ethnic groups and cultures as part of their education since they need to learn to function in a pluralistic world (App. at p. 118a).

In addition to attempting to provide a racially diverse fac-

ulty for the educational benefit of the School Corporation's students, Resolution 1020 was designed to eradicate the effects of past discrimination in the recruitment, hiring, and assignment of minority teachers (Testimony of Hollis Hughes, Jr. – Trial Transcript at 89-96). As a consequence of past discrimination, in late 1978 when the Board adopted Resolution 1020, the percentage of black teachers employed by the School Corporation was only 10.4 percent, while the percentage of blacks in the student body and in the community was approximately 22 percent.

The discussions which led to the adoption of Resolution 1020 occurred at several school board meetings. At a school board meeting held on June 18, 1978, Ms. Eugenia Braboy, in a statement marking the end of her service as a member of the Board, asserted that racially identifiable schools still existed in the School Corporation. Ms. Braboy moved the Board to adopt a resolution setting a five year goal within which to adopt and implement a program to reduce the racial imbalance in School Corporation (Def. Ex. K-1).

At later board meetings, statistical evidence was presented portraying the remnants of the prior discrimination found by the HEW. For example, Mr. Willie Green, a leader of the black community, presented evidence that the percentage of blacks in the community was 21.7 percent while the percentage of blacks on the teaching staff was 10.4 percent. Mr. Green also informed the Board of five instances where qualified blacks were not hired for available teaching positions because of their race (Def. Ex. K-2).

In the three years following the adoption of Resolution 1020, the School Corporation began to diversify its faculty and to eliminate the traces of prior discrimination by hiring a greater percentage of black teachers than it had in any prior three-year period. In the twelve-year period prior to the adoption of Resolution 1020, the School Corporation only increased the percentage of its black teachers by 4.25 percent. In the three years after the Resolution, the School

Corporation increased the percentage of minority teachers by 2.6 percent. As a result, the percentage of black teachers increased from 10.4 percent for the 1978-79 school year to 13.0 percent for the 1981-82 school year. Nevertheless, the percentage of black teachers was still far below the percentage of black pupils (25.24 percent) (Def. Ex. E-1).

On February 8, 1980, the United States Department of Justice, *amicus curiae* below in support of the plaintiffs, filed a complaint against the School Corporation which alleged, in part, that the School Corporation had engaged in intentional acts of racial discrimination by hiring, assigning, and promoting faculty and staff members on the basis of race. The Attorney General of the United States, Benjamin R. Civiletti, certified that he had investigated complaints of discrimination by the parents of minority children in the School Corporation and that he believed the complaints were meritorious. The parties resolved the case through the entry of a Consent Order. The Consent Order required the School Corporation to continue to pursue the affirmative action hiring policies embodied in Resolution 1020. App. at p. 123a.

C. The Adoption of the No Minority Layoff Clause, Article XXIII, § 9.

On May 16, 1980, the School Corporation entered into the CBA with the NEA-South Bend. Article XXIII, § 9 of the CBA provided that in the event of a reduction in force "no minority bargaining unit employee shall be laid off." Article XXIII contained other provisions designed to mitigate the impact of any layoff upon nonminority teachers. Article XXIII, § 4, for example, provided that any teachers laid off during the term of the CBA would be recalled first once the School Corporation began rehiring teachers. App. at p. 126a. Article XXIII, § 8 provided that teachers who had been laid off would be given the first opportunity to work as substitute teachers and created 15 permanent substitute teacher positions to be filled by laid off teachers

according to seniority. Article XXIII, § 8 also gave laid off teachers priority for temporary (daily) substitute positions. Substitute teachers were paid a daily rate equal to their annual salary divided by the number of days in a school year. App. at pp. 127a-128a.

During the negotiation of the 1980-83 CBA, the School Corporation's administrative staff and the Board were aware that a teacher lay-off might be necessary during the term of that agreement (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, pp. 131-33; Trial Transcript, p. 38). The School Corporation had been informed by the HEW, in August, 1975, that layoffs made on the basis of strict seniority were discriminatory if previous hiring practices had been discriminatory (Def. Ex. M-4).

The School Corporation's negotiating team thus proposed the "no minority layoff" provision to ensure that the success achieved in affirmatively recruiting minority teachers, pursuant to Resolution 1020 and the Consent Order, would not be wiped out by a reduction in the teaching force. Article XXIII, § 9 prohibited the layoff of black teachers because, as part of a collective bargaining agreement of limited duration, it was extremely unlikely the provision would increase the percentage of black teachers beyond the extent reasonably necessary to provide a diverse faculty and to eliminate the imbalance between the School Corporation's pupil enrollment and teaching force.

The 1980-83 CBA was presented and explained to the School Corporation's teachers by the NEA-South Bend. The teachers ratified the proposed CBA by a substantial margin. Officers of the union and of the School Corporation then signed the CBA. None of the plaintiffs, and no other teachers employed by the School Corporation, have ever filed a grievance or complaint alleging that the NEA-South Bend had not properly represented them in negotiating or explaining the CBA.

Prior to the layoff, the School Corporation employed 1,255 white teachers (Def. Exs. F and I). Fifteen of the 41 plaintiffs were not affected by Article XXIII, § 9 because they were immediately recalled. Another 10 to 13 of the 41 plaintiffs were not affected by Article XXIII, § 9 because their seniority was so low that they would have been laid off on the basis of strict seniority. Thus, at most, 16 plaintiffs were affected by Article XXIII, § 9. Unless three of those plaintiffs prevail on state law claims for extra seniority, Article XXIII, § 9 affected only 13 plaintiffs – slightly over one percent of the School Corporation's white teachers at the time of the layoff.

II. Proceedings Below.

As noted above, in 1982 the plaintiffs filed suits against the School Corporation alleging that Article XXIII, § 9 was unconstitutional and violated 42 U.S.C. §§ 1981, 1982, 1983 and 2000e *et seq.* The district court entered an opinion and judgment in favor of the School Corporation on the plaintiffs' claims under federal law. The district court found that Article XXIII, § 9 was substantially related to achieving the important governmental purpose of remedying prior discrimination. App. at pp. 112a, 116a.

The plaintiffs appealed the district court's judgment to the Court of Appeals for the Seventh Circuit. On October 21, 1985, a divided panel affirmed the judgment of the district court in favor of the School Corporation. The majority found overwhelming evidence of past discrimination to justify the School Corporation's affirmative action plan and the use of Article XXIII, § 9 to preserve the fruits of that plan. Analyzing several pertinent factors, the majority also found that Article XXIII, § 9 was "essential and crucial" to accomplishing its purposes. App. at p. 78a.

On May 18, 1987, the Court of Appeals, by a five to four vote, reversed the district court's judgment. App. at pp. 2a-42a. The *en banc* Court of Appeals issued five separate opinions, none of which constituted a majority view.

Judge Posner, writing for himself and two other judges, held Article XXIII, § 9 unconstitutional because, in his view, it was tied to an improper hiring goal. Judges Flaum and Bauer, concurring in the judgment, struck down Article XXIII, § 9 because it prohibited the layoff of minority teachers during the three-year term of the CBA.

This Court decided *Wygant v. Jackson Board of Education* between the date of the district court's opinion in this case and the Seventh Circuit's *en banc* decision. Unable to find that the plaintiffs, who had lost in the district court after a trial, had met their burden of proof as a matter of law, the four dissenting judges all urged remand for further fact-finding and analysis in light of *Wygant*. Judge Cudahy, joined by the other three dissenting judges, noted that the "most striking aspect about this case is the kaleidoscope of legal scenery against which the facts have been projected at various times." App. at p. 27a. He then stated that "[b]ecause of the extreme fluidity of the law and the consequent striking shifts in the relevance of various facts, it would be much better practice to remand to the fact-finder – the district court – to determine in the first instance the disposition of this case in light of [certain] recent Supreme Court decisions." App. at p. 28a.

REASONS FOR GRANTING THE WRIT

I. Summary Of Reasons.

The questions presented by this case are important for several reasons. First, one of the questions – whether the School Corporation's interest in enhancing the quality of education for all students by providing a racially diverse faculty is sufficiently compelling to warrant affirmative action – is one on which this Court has previously expressly reserved decision.

Second, as evidenced by the many and varied opinions of the closely divided *en banc* Seventh Circuit, there is an urgent need for additional guidance from this Court on the

permissible limits of affirmative action in a time of layoffs. The vast majority of public school districts have an affirmative action plan. They can face the questions presented in this case every time they experience declining pupil enrollment or budgetary constraints. Guidance from this Court is critical because school districts can be liable to minority teachers if they do not adopt affirmative measures and to nonminority teachers if they do, but go too far. The public has an interest in having known and clear standards for determining liability in cases of this nature because school districts must satisfy any liability by passing the liability on to the public or by diverting funds from educational purposes.

Finally, the *per se* analyses employed by the plurality and concurring opinions below are inconsistent in approach with numerous decisions of this Court in the affirmative action area, especially *Wygant v. Jackson Board of Education* and *United States v. Paradise*. This Court's decisions have rejected a *per se* approach in favor of a careful balancing of several factors. In the concurring opinion below, one of many factors this Court had identified went from being one of the weights in the scale to being dispositive.

II. The Decision Below Holding The School Corporation's Affirmative Action Layoff Provision Unconstitutional *Per Se* Raises Important And Unresolved Issues.

In *Wygant v. Jackson Board of Education*, 476 U.S. ___, 106 S. Ct. 1842 (1986), the Court granted certiorari "to resolve the important issue of the constitutionality of race-based layoffs by public employers." 476 U.S. at ___, 106 S. Ct. at 1846. Although the Court struck down the affirmative action layoff measures employed by the Jackson Board of Education, as Justice Marshall noted "the Court has left open whether layoffs may be used as an instrument of remedial action." 476 U.S. at ___ n.7, 106 S. Ct. at 1867 n.7 (Marshall, J., dissenting). Discussing the

Wygant case, Dean Choper referred to affirmative action as "one of the most significant and controversial constitutional issues of our time." Choper, *Continued Uncertainty As To The Constitutionality Of Remedial Racial Classifications: Identifying The Pieces Of The Puzzle*, 72 Iowa L. Rev. 255, 255 (1987).

The importance of the questions raised in this case is enhanced by the fact that the first question – whether a public school district has a compelling interest in enhancing the quality of education for all its students by promoting racial diversity among its faculty – is one on which this Court has previously reserved decision. In *Wygant*, Justice O'Connor wrote:

> The goal of providing "role-models" discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty. Because this latter goal was not urged as such in support of the layoff provision before the District Court and the Court of Appeals, however, I do not believe it necessary to discuss the magnitude of that interest or its applicability in this case.

476 U.S. at ___ n.*, 106 S. Ct. at 1854 n.*. The opinions of Justices Marshall and Stevens suggested this question should be answered affirmatively. *See Wygant*, 476 U.S. at ___, 106 S. Ct. at 1863 (Marshall, J. dessenting); 476 U.S. at ___, 106 S. Ct. at 1868 (Stevens, J. dissenting). Indeed, "*Wygant* reached the Supreme Court without the inclusion of the one employer argument that could have met the equal protection test of *Bakke*: That the achievement of ethnic diversity helpful to the education process is a compelling state interest." Kandel, *The Limits of* Wygant v. Jackson Board of Education, 12 Empl. Rel. L.J. 289, 290 (1986). The Court should seize this opportunity to resolve the question and inform the lower courts and school administrations of its answer.

This case squarely presents the question whether the

promotion of racial diversity among the faculty of primary and secondary educational institutions is a sufficiently compelling or important interest to justify the adoption of an affirmative action plan. Indeed, the opening paragraph of Resolution 1020 explicitly states its purpose:

> Public schools reflect a cross section of society from all ethnic, socio-economic and other phases of the community. To provide in-depth education, the schools need to provide in the learning environment an opportunity for children to experience highly qualified representatives of all ethnic groups and cultures as part of their education since they need to learn to function in a pluralistic world.

App. at p. 118a. The dissenting opinion authored by Judge Cummings approved of the seemingly harsh no minority layoff provision because the provision "was not only a remedy for past discrimination against black teachers, but also was part and parcel of the School Corporation's constitutionally mandated efforts to replace its dual school system with an integrated learning environment." App. at p. 22a. In its Brief on Rehearing *En Banc*, the School Corporation urged the Seventh Circuit to approve the goal of attempting to appoximate the percentage of black teachers in its work force with the percentage of blacks in its student body as being narrowly tailored to the purpose of promoting racial diversity on its faculty (Def. Brief on Rehearing *En Banc*, pp. 16-17, 22). The NAACP Legal Defense Fund and Lawyer's Committee for Civil Rights under Law, *amicus curiae* in the Seventh Circuit, also argued that the promotion of a racially diverse faculty is a sufficiently compelling purpose to justify affirmative action.

Notwithstanding the arguments of the dissenting judges, the School Corporation, and the *amicus curiae*, Judge Posner rested his opinion on his conclusion that "the plan was invalid because tied to an improper hiring goal, that of equating the fraction of black teachers to the frac-

tion of black students." App. at p. 14a. That goal, however, is entirely proper and logical if the plan has the dual purposes of promoting a racially diverse faculty and remedying past discrimination. This Court should grant certiorari to address whether this purpose is sufficiently compelling or important to warrant affirmative action.

The number of Americans affected by affirmative action programs and the recurring nature of the fact pattern giving rise to these issues heightens the importance of the questions presented. By the force of HEW regulations, all public school districts which provide vocational education and receive federal financial assistance are obliged to take steps to overcome the effects of past discrimination in the recruitment, hiring, and assignment of faculty, i.e., to take affirmative action. 34 C.F.R. Part 100, App. B. at 337 (1986). The National School Boards Association conducted an informal survey of the nation's largest school districts for its *amicus curiae* brief in the *Wygant* case. The survey disclosed that of the 60 percent of the districts responding, over two-thirds have voluntarily adopted affirmative action plans and twelve districts have plans or collective bargaining agreements that afford protection against layoff to minority teachers. Brief of National School Boards Ass'n at 14-17, *Wygant v. Jackson Board of Education*, 476 U.S. ___ (1986) (No. 84-1340).

Moreover, the impact of the Seventh Circuit's overly broad reading of *Wygant* reaches beyond public school districts. Employers of all kinds have affirmative action plans; none are immune from layoffs. For example, in *NAACP v. Detroit Police Officers Ass'n*, 125 L.R.R.M. (BNA) 2784 (6th Cir. 1987), the City of Detroit laid off 1,100 police officers in 1979-1980, approximately 75 percent of whom were black. This combination of facts – a need for layoffs following a sharp increase in minority hiring pursuant to an affirmative action plan – raises the questions presented in this case. The combination is not

rare.* The Seventh Circuit's expansion of *Wygant* effectively prohibits employers from protecting recently hired minorities from cyclical layoffs. These employers need additional guidance from this Court on the permissible limits on the use of layoffs to preserve gains made pursuant to affirmative action plans.

The potential liability of public employers for missteps in their efforts to protect minority employees against layoffs adds to the importance of the questions presented and merits this Court's attention. When a public school district suffers an adverse judgment, the money can come from only one of two places. Either the public will pay the judgment through increased taxes or the money will be diverted from another use which would otherwise further the school district's overall purpose of providing quality education to its students.

Justices Blackmun and O'Connor have previously commented on the dilemma confronting public employers in the affirmative action context:

The broad prohibition against discrimination [in

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*There is considerable evidence of the potentially widespread impact of a decision in this case. For example, an Associated Press story released the day after the *Wygant* decision reported that the decision drew into question all the State of Michigan's labor contracts. Those contracts, in order to further affirmative action purposes, provided for layoffs not based on seniority. "Michigan Teachers Surprised at Supreme Court Ruling," Associated Press (May 20, 1986) (text in NEXIS). In a May 25, 1986, editorial in the Los Angeles Times, Professor Schwartz of the American University School of Law asserted that thousands of affirmative action programs, affecting millions of American workers, were affected by the Court's decision in *Wygant*. Schwartz, "Supreme Court Holds to Affirmative Action," L.A. Times, May 25, 1986, Part 5, at 3, col. 4. Professor Schwartz further noted that, during the 1974-75 fiscal year, more than half of all Latino city workers in New York lost their jobs because of seniority-based layoffs.

> Title VII] places the employer and the union on what [Judge Wisdom, dissenting from the Fifth Circuit's decision in Weber] accurately described as a "high tightrope without a net beneath them." If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

United Steelworkers of America v. Weber, 443 U.S. 193, 209-10 (Blackmun, J., dissenting; citations omitted). *See also Wygant*, 476 U.S. at ___, 106 S. Ct. at 1855 ("[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken.") (O'Connor, J., concurring; emphasis in original); *Johnson v. Transportation Agency, Santa Clara, California*, ___ U.S. at ___, 107 S. Ct. at 1463 (1987) (opinion of O'Connor, J.).

This problem has taken on a new twist as minority employees have recently brought suits contending that an employer's affirmative action plan entitled the minority employee to favorable treatment at the time of layoff. At least one such suit has succeeded to date. In *Liao v. Dean*, 658 F. Supp. 1554 (N.D. Ala. 1987), the Tennessee Valley Authority had employed Liao, a Chinese female Ph.D., pursuant to its affirmative action program. During a reduction in force Dr. Liao was terminated, though TVA retained a less senior white male. The district court held Dr. Liao was entitled to favorable treatment at the time of layoff, writing:

> The whole rationale for TVA's [affirmative action plan] is frustrated and made into a sham unless Dr. Liao is given the benefit of the doubt during a [reduction in force]. In this instance, TVA was perfectly aware of its [affirmative action plan] requirements and yet made a decision without in

> any way giving Dr. Liao the preferential consideration she was due under the [affirmative action plan]. An employer simply cannot be allowed to advertise itself as an affirmative action employer and then wink at its [affirmative action plan] when it gets in the way.

658 F. Supp. at 1561. *See also NAACP v. Detroit Police Officers Ass'n*, 125 L.R.R.M. (BNA) 2784 (6th Cir. 1987) (complaint alleges judicial approval of public employers' affirmative action plan forecloses employer from later laying off recently hired minority employees who would otherwise be laid off on the basis of seniority under a collective bargaining agreement). The governing bodies of school corporations, other employers, and their counsel all desperately need clear guidance on the permissible limits on the use of affirmative action measures during a reduction in force.

The many opinions rendered by the *en banc* Court of Appeals also illustrate the need for further guidance in this area. In *Wygant*, the Court stated that a layoff plan (1) must serve a compelling or important governmental purpose and (2) must be narrowly tailored or substantially related to achieving that purpose. In this case, the Court of Appeals ruled in favor of the School Corporation by a six to three margin on the first prong, but ruled against the School Corporation by a five to four margin on the second. The five judges who comprised the majority could not agree on a rationale. Three of them based their decision on the fact that the School Corporation's plan was purportedly tied to an improper hiring goal while the other two rested their decision on the fact that Article XXIII, § 9 prohibited the layoff of minority teachers during the three year term of the CBA. Three dissenting opinions were filed. A case presenting issues that so closely divided the *en banc* Court of Appeals warrants further consideration by this Court. *See Rinaldi v. United States*, 434 U.S. 22 (1977); *Miree v. DeKalb County*, 433 U.S. 25 (1977); *Oil Workers' Union v.*

Mobil Oil Corp., 426 U.S. 407, 412 (1976).

We now turn to the final factor contributing to the importance of the questions presented – namely, the incorrect manner in which the questions were decided below through the use of an unprecedented *per se* analysis and without remand to the district court for additional evidentiary proceedings in light of *Wygant v. Jackson Board of Education.*

III. The Decision Below Conflicts In Principle With Decisions Of This Court And Of Other Circuits.

The plurality and concurring opinions below conflict in principle with decisions of this Court and of other circuits in three respects. First, as noted above, Judge Posner invalidated Article XXIII, § 9 because, in his view, it was tied to an improper hiring goal; his opinion did not consider, however, whether the School Corporation's interest in promoting racial diversity among its faculty was sufficiently compelling or important to justify the hiring goal. Second, Judge Flaum's opinion finds Article XXIII, § 9 unconstitutional *per se* by ignoring several relevant factors, contrary to numerous affirmative action decisions of this Court which carefully balance these factors. Third, the refusal of the plurality and concurring opinions to remand the case for further fact-finding and analysis in light of this Court's *Wygant* opinion is contrary to *Lehman v. Trout*, 465 U.S. 1056 (1984) (mem.) and *Pullman-Standard v. Swint*, 456 U.S. 263 (1982), and to the decisions of at least two other circuits since *Wygant.*

A. The Decision Below Conflicts In Principle With *Bakke* And *Wygant.*

This Court's opinions in *Bakke* and *Wygant* noted that promoting racial diversity may be a compelling purpose for an educational institution. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a medical school admissions program which reserved a certain number of

places for minority students was challenged as unlawful race discrimination. The medical school defended the program on several grounds. Discussing one ground, Justice Powell wrote:

> The fourth goal asserted by [the medical school] is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. . . .
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> * * *
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> [T]he interest of diversity is compelling in the context of a university's admissions program. . . .

438 U.S. at 311-312, 314.

Following the lead of Justice Powell in *Bakke*, in *Wygant* at least five members of the Court were willing to recognize the promotion of racial diversity among faculty, at the primary and secondary education levels, as a compelling governmental purpose. Justice Marshall, joined by Justices Brennan and Blackmun, wrote:

> Were I satisfied with the record before us, I would hold that the state purpose of preserving the integrity of a valid hiring policy – which in turn sought to achieve diversity and stability for the benefit of all students – was sufficient, in this case, to satisfy the demands of the Constitution.

476 U.S. at ___, 106 S. Ct. at 1863. Justice Stevens asked "whether the Board's action advances the public interest in educating children for the future" and answered that "a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all white, or nearly all white, faculty." 476 U.S. at ___, ___, 106 S. Ct. at 1867, 1868. Justice O'Connor noted that the "goal of providing 'role-models' discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty." 476 U.S. at ___ n.*, 106 S. Ct.

at 1854 n.*. Justice O'Connor found it unnecessary to discuss the applicability of this interest in *Wygant* but further noted that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." 476 U.S. at ___, 106 S. Ct. at 1853.

Notwithstanding the apparent willingness of a majority of this Court to recognize the promotion of racial diversity among faculty as a compelling governmental purpose, as noted above, Judge Posner held Article XXIII, § 9 unconstitutional because he considered it to be tied to an improper hiring goal. His opinion, however, considered the propriety of the hiring goal only in light of the School Corporation's interest in remedying prior discrimination. Judge Posner analyzed neither the weight of the School Corporation's interest in providing a racially diverse faculty nor the propriety of the School Corporation's hiring goal in light of that interest. This approach conflicts with the views espoused by a majority of this Court.

B. The *Per Se* Analysis Developed By The Concurring Opinion Below Conflicts In Principle With Several Affirmative Action Decisions Of This Court.

As noted above, Judges Flaum and Bauer rested their decision that Article XXIII, § 9 was unconstitutional solely on the fact that it prohibited the layoff of minorities during the three-year term of the CBA. App. at p. 17a. Never mind the fact that Indiana law authorized *de jure* segregation in public schools until 1949. Never mind the fact that, over 20 years after this Court's decision in *Brown v. Board of Education* and eight years after this Court's command in *Green v. County School Board* to "implement a plan that promises realistically to work, and promises realistically to work *now*," 391 U.S. at 439 (emphasis in

original), the HEW found that the School Corporation still maintained a racially segregated system. Never mind that the CBA would be in effect for only three years and that it was inconceivable that during the term of the CBA the School Corporation would achieve its goal of raising the percentage of minority teachers in its work force until it approximated the percentage of minority students in the student body. Never mind that the CBA contained provisions to mitigate the impact of layoffs on nonminority teachers, such as 15 permanent substitute positions to be filled by laid off teachers according to seniority, and preferential recall and daily substitution rights for laid off teachers. Never mind that the CBA was explained to the teachers, a majority of whom are white, by their bargaining representative and that it received overwhelming approval. Never mind that the provision appears to have affected only one percent of the School Corporation's white teachers. Under Judge Flaum's analysis, all these factors are completely irrelevant; the provision is unconstitutional simply because it prohibits the layoff of minorities.

The *per se* approach of the concurring judges below contrasts starkly with the affirmative action decisions of this Court, which painstakingly balance several factors. For example, in *Johnson v. Transportation Agency*, the Court applied the factors first identified in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), namely, whether a plan (1) unnecessarily trammeled the interests of white employees, (2) created an absolute bar to the advancement of white employees, and (3) was a temporary measure. *Johnson*, ___ U.S. at ___, 107 S. Ct. at 1449.

In *United States v. Paradise*, 480 U.S. ___, 107 S. Ct. 1053 (1987), the Court considered a challenge to a one-black-for-one-white promotion requirement to be applied as an interim measure to state trooper promotions in the Alabama Department of Public Safety. 480 U.S. at ___, 107 S. Ct. at 1057. Discussing the appropriate analysis in such

a case, Justice Brennan wrote:

> In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

480 U.S. at ___, 107 S. Ct. at 1067 (citations omitted). Justice Powell likewise identified five factors relevant to "determining whether an affirmative action remedy is narrowly drawn to achieve its goal." 480 U.S. at ___, 107 S. Ct. at 1075. Scholars have commented on the careful balancing process evidenced by the Court's affirmative action decisions. *E.g.* Choper, *supra*, at 274 ("Justice Powell employs a balancing process even where remedying a prior violation."); Stewart, *Affirmative Action Barely Upheld*, 72 A.B.A. J. 44, 44 (Dec. 1, 1986) ("The strength of [the] competing claims has led the justices to avoid bright-line standards. Instead, the Court has focused on the factual circumstances of each case, weighing various facts or procedural elements.").

The conflict between Judge Flaum's opinion and this Court's decision in *United States v. Paradise* is dramatic. Judge Flaum held Article XXIII, § 9 unconstitutional because it prohibited the layoff of minority teachers during the three-year term of the CBA. In *Paradise*, the government suggested "that the one-for-one requirement [was] arbitrary because it [bore] no relationship to the 25% minority labor pool relevant here." 480 U.S. at ___, 107 S. Ct. at 1071. Justice Brennan responded:

> This argument ignores that the 50% figure is not itself the goal; *rather it represents the speed at which the goal of 25% percent will be achieved.* The interim requirement of one-for-one promotion (had it continued) would simply have determined how quickly the Department progressed toward this

> ultimate goal. . . .To achieve the goal of 25% black representation in the upper ranks, the court was not limited to ordering the promotion of only 25% blacks at any one time. Some promptness in the administration of relief was plainly justified in this case, and use of deadlines or end-dates had proven ineffective. In these circumstances, the use of a temporary requirement of 50% minority promotions, which, like the end date in *Sheet Metal Workers*, was crafted and applied flexibly, was constitutionally permissible.
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> * * *
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> Again, however, [the proposal limiting minority promotions to 25%] completely ignores the fact and the effects of the Department's past discrimination and its delay in implementing the necessary promotion procedure.

480 U.S. at ___, 107 S. Ct. at 1071 (emphasis added). Similarly, the no minority layoff provision did not represent the School Corporation's goal. The School Corporation was not striving to achieve an all black teaching staff. Rather, the no minority layoff provision simply represented the speed at which the School Corporation would continue to reduce the disparity between the percentage of black teachers and the percentage of black students in the corporation.

In *Paradise*, the Court stated that "the Department's prior employment practices and conduct during this lawsuit bear *directly* on the constitutionality of any race-conscious remedy imposed upon it." 480 U.S. at ___, 107 S. Ct. at 1058 (emphasis added). Though the School Corporation's six to seven year delay in curing the discrimination found by the HEW is irrelevant under Judge Flaum's analysis, in *Paradise* "[i]t would have been *improper* for the District Judge to ignore the effects of the Department's delay and its continued default of its obligation to develop a promotion procedure. . . ." 480 U.S. at ___, 107 S. Ct. at 1072 (emphasis added). Justice Powell agreed, concluding that "[g]iven the findings of persistent discrimination, the Department's longstanding resistance to necessary reme-

dies, and the exigent circumstances presented to the District Court, the imposition of a one-for-one requirement for the particular promotions at issue does not violate the Equal Protection Clause." 480 U.S. at ___, 107 S. Ct. at 1076.

As further justification for upholding the district court's choice in *Paradise* of the one-for-one promotion policy over a one-for-three proposal, Justice Brennan wrote:

> Following adoption of the plaintiffs' proposal that 8 blacks and 8 whites should be promoted, the corporal rank was composed of 14 black and 73 white troopers (16% black). Under the Department's proposal that 4 blacks and 11 whites should be promoted, the corporal rank would have been composed of 8 black and 79 white troopers (9.2% black). Neither proposal would have raised the percentage of blacks in the corporal rank to the 25% mark set as an alternate goal by the District Court. . . .

480 U.S. at ___ n.30, 107 S. Ct. at 1072 n.30. *See also Smith v. Harvey*, No. 84-212-Civ-T-13, slip op. (M.D. Fla. Oct. 3, 1986) ("The city fire department had not yet met its promotion goals at the time the plaintiffs filed this suit. . . . [T]he mere speculation that the plan would be illegally maintained did not present an issue ripe for determination at the time this action was filed.") (text in LEXIS, Genfed library, dist file). In this case, the effect of Article XXIII, § 9 was to raise the percentage of black teachers in the School Corporation from 13.0 percent to 13.8 percent. At the time, the percentage of black students was approximately 25 percent. This fact was irrelevant under Judge Flaum's analysis, however. The lower courts are misreading *Wygant* to strike down all attempts to preserve affirmative action during a reduction in force without due regard to all factors that affect the validity of such efforts.

C. The Court Of Appeals' Failure To Remand Is Inconsistent In Principle With Decisions Of This Court And At Least Two Courts Of Appeal.

In *Wygant*, this Court addressed for the first time the constitutionality of layoffs by a public employer on the basis of race. Prior to *Wygant* the Circuit and District Courts had generally applied the factors identified in *Weber* and *Bakke* when assessing affirmative action plans. *Wygant* identified additional factors to consider in the layoff context, such as the extent of the burden imposed on nonminority teachers by the layoff and the school district's interest in improving education by having a racially diverse faculty. Because the district court relied on the School Corporation's interest in remedying past discrimination to uphold the plan, whether the interest in having a racially diverse faculty could justify Article XXIII, § 9 was not considered. Further, while containing evidence of provisions that mitigated the impact of Article XXIII, § 9 on white teachers, the record is far from complete on the issue of the burden imposed on the laid off teachers by that provision. The district court certainly made no findings on this factor.

In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), this Court held: "Where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record presents only one resolution of the factual issue." 456 U.S. at 292. *See also Lehman v. Trout*, 465 U.S. 1056 (1984) (mem.). *Accord Johnson v. Transportation Agency*, ___ U.S. at ___ n.4, 107 S. Ct. at 1470 n.4 (1987) (Scalia, J. dissenting). Even though *Wygant* was decided between the time of the district court's judgment and the time of the judgment of the Court of Appeals *en banc*, the plurality and concurring opinions refused to remand this case to the district court for further fact-finding and analysis in light of *Wygant*. This disposition conflicts with the Court's decisions in *Pullman-Standard v. Swint* and

Lehman v. Trout.

In *LeDoux v. District of Columbia*, 820 F.2d 1293 (D.C. Cir. 1987), the court considered a challenge to promotions made pursuant to a voluntary affirmative action plan adopted by the Metropolitan Police Department of the District of Columbia designed to place "special emphasis" on the hiring and advancement of females and minorities. With regard to the fourteenth amendment challenge, however, the D.C. Circuit wrote:

> [T]he trial court did not have the benefit of *Wygant* when it undertook to examine the validity of the Plan. As a consequence, it did not make factual findings geared to the legal question whether the Plan is permissible under the Constitution. We must therefore remand for further findings because the Supreme Court has made it absolutely clear that the requisite findings in an employment discrimination suit are to be made by the trial court, not the court of appeals.

820 F.2d at 1305 (citations omitted). Similarly, in *Long v. City of Saginaw*, No. 85-1352, slip op. (6th Cir. Oct. 20, 1986) (text in Westlaw, CTA6 library), the plaintiffs challenged a modification to a collective bargaining agreement permitting the hiring of one minority police officer for every officer recalled from layoff status. The district court held for the public employer. On appeal, the Sixth Circuit wrote:

> In evaluating the cross motions for summary judgment before it, the district court relied heavily on this court's opinion in *Wygant v. Jackson Board of Education*, 746 F. 2d 1152 (6th Cir. 1984). However, our opinion in *Wygant* was recently reversed by the Supreme Court. *Wygant v. Jackson Board of Education*, ___ U.S. ___, 106 S. Ct. 1842 (1986). For this reason, we are of the opinion that this case should be REMANDED to the district court for reconsideration in light of the Supreme Court's ruling in *Wygant, supra.*

Long, slip op. at ___. At least two courts of appeals have recognized their responsibility to remand cases to the district court as the trier of fact for further fact-finding and analysis in light of this Court's *Wygant* decision where that decision was rendered between the time of the district court's judgment and the appellate court's decision. The decision in this case conflicts with decisions of the Sixth and District of Columbia Circuits.

To support his disposition below, Judge Posner noted that this Court did not remand *Wygant* for further evidentiary proceedings and analysis in light of the standards announced therein. *Wygant*, however, arose in an entirely different procedural context from this case. The district court in *Wygant* rendered its decision in response to cross motions for summary judgment. *See* 476 U.S. at ___, 106 S. Ct. at 1846. Because the parties in *Wygant* were in agreement that there were no genuine issues of material fact, remand would have served no purpose as there were no facts to be tried. While the parties attempted to create factual issues by lodging material with this Court, the Court disregarded the lodged material.

In contrast, the district court rendered its decision in this case after a trial of disputed facts. The standard of review on appeal, though nowhere alluded to in either the plurality or concurring opinion below, was whether the district court's findings were clearly erroneous. The *plaintiffs*, not the School Corporation, had the burden of proving that Article XXIII, § 9 did not serve a compelling or important governmental interest or that it was not narrowly tailored or substantially related to accomplishing that interest. *Wygant*, 476 U.S. at ___, ___, 106 S. Ct. at 1850 and 1860-61 n.3 (O'Connor, J. concurring, and Marshall, J. dissenting); *Johnson v. Transportation Agency*, ___ U.S. at ___, 107 S. Ct. at 1449. The district court held that the plaintiffs had failed to meet that burden. Yet the plurality and concurring judges of the Court of Appeals simply

reversed the district court without setting aside any of its findings as clearly erroneous and without remanding for further consideration and fact-finding in light of *Wygant*. This disposition conflicts with *Pullman-Standard v. Swint*, *Lehman v. Trout*, and the decisions of the Sixth and District of Columbia Circuits cited above and warrants summary reversal with instructions to remand this case to the district court for further evidentiary proceedings and analysis in light of *Wygant*.

CONCLUSION

On the basis of the foregoing arguments and authorities, this Petition for Certiorari should be granted. This Court should give the case plenary consideration to determine whether Article XXIII, § 9 can be justified in relation to the compelling governmental interest in promoting racial diversity among the faculty at primary and secondary schools and whether Article XXIII, § 9 is narrowly tailored or substantially related to achieving its purposes when all relevant factors are considered. Alternatively, the Court should summarily reverse the *en banc* decision of the Court of Appeals with instructions to remand the case to the district court for further fact-finding and analysis in light of *Wygant v. Jackson Board of Education.*

Respectfully Submitted,

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